BRAD D. BRIAN (CA Bar No. 079001, *pro hac vice*)
Brad.Brian@mto.com
LUIS LI (CA Bar No. 156081, *pro hac vice*)
Luis.Li@mto.com
TRUC T. DO (CA Bar No. 191845, *pro hac vice*)
Truc.Do@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100

THOMAS K. KELLY (AZ Bar No. 012025)
tskelly@kellydefense.com
425 E. Gurley
Prescott, Arizona 86301
Telephone: (928) 445-5484

Attorneys for Defendant JAMES ARTHUR RAY

SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. VCR1300CR201080049

DEFENDANT JAMES ARTHUR RAY'S OPPOSITION TO STATE'S MOTION TO QUASH SUBPOENAS *DUCES TECUM* DIRECTED TO THIRD PARTIES; DECLARATIONS OF TRUC T. DO AND THOMAS K. KELLY IN SUPPORT THEREOF.

I. INTRODUCTION

The State's motion to quash subpoenas *duces tecum*, which subpoenas the defense offered to withdraw upon learning belatedly that the State already disclosed documents identical to those sought by the subpoenas, and which are directed to independent third parties who have not themselves challenged the subpoenas, constitutes a profound waste of judicial resources. This dispute is clearly moot.

Mr. Ray offered to withdraw the subpoenas *duces tecum* issued on his behalf to avoid unnecessary litigation of a moot issue, not because there is any merit to the State's motion to quash — there is none. The subpoenas were issued pursuant to the normal and customary practice used by local defense counsel for the last twenty years. Moreover, the State's over-aggressive and novel approach fails as a matter of law. First, the State has no standing to even bring this motion to quash and the Court should deny the motion for this reason alone. Second, the subpoenas are directed to emergency responders, fire departments, hospitals and coroners — independent third parties who are neither "an arm of the prosecutor" nor operate under the direction or control of the prosecutor. For that reason, Rule 15.1 does not require the defense to first seek the requested information from the State. Finally, Rule 15.1(g) does not eliminate Arizona's "long-standing history of issuing subpoenas seeking documentary evidence in criminal matters." *Martson's Inc. v. Strand*, 114 Ariz. 260, 263 (1977).

But the State persists. This motion is before the Court because the State conditioned a withdrawal of its admittedly moot motion on the defense's agreement to a bar of *all future subpoenas duces tecum to any party* without a court order authorizing the issuance of the subpoenas. This is not only an improper use of motion practice by the State, but the State's condition is tantamount to a prior restraint on Mr. Ray's right to pre-trial investigation of the charges. The State is aware that such a condition when *ordered by a trial court* has been struck down as overbroad. *See Carpenter v. Maricopa County*, 176 Ariz. 486, 488 (App. 1993). The Court should not sanction the State's attempt to interfere — prospectively — with the defendant's proper efforts to obtain discovery. The motion should be denied.

II. PERTINENT FACTS

The State has alleged that three people died of heat stroke and nineteen (19) others were treated by paramedics and hospitals for heat-related injuries, as a result of the October 8, 2009 sweat lodge led by Mr. Ray. On February 10, 2010, five months since the accident, the State had produced only the autopsy reports and photographs and a two-page summary from the Verde Valley Fire Department regarding its response to the scene on October 8, 2009. Missing was any record of the decedents' and participants' vital statistics, symptoms, or diagnosis, from the numerous emergency responders and medical providers who rendered medical assistance, that would allow the defense to investigate the evidence on cause of death and injury. Declaration of Truc T. Do ¶ 2 (hereinafter "Do Decl.").

Thus, pursuant to the normal and customary practice used by local defense counsel for the last twenty years, Do Decl. ¶¶ 2-3 and Declaration of Thomas K. Kelly ¶¶ 2-3 (hereinafter "Kelly Decl."), Mr. Ray prepared and submitted to the Court ten (10) subpoenas *duces tecum* seeking evidence on cause of death and injury for the following third parties:

- Fire Departments — Cottonwood Fire District, Sedona Fire District and Verde Valley Fire Department.
- Patient Transportation Services — Guardian Air Helicopter and Verde Valley Ambulance Company.
- Hospitals — Verde Valley Medical Center, Sedona Medical Center, and Flagstaff Medical Center.
- Coroners — Yavapai County Medical Examiner's Office and Coconino County Medical Examiner's Office.

Kelly Decl. ¶ 4; Do Decl. ¶ 4 and Exh. A. On March 16, 2010, a Clerk of the Superior Court issued the requested subpoenas on behalf of Mr. Ray, which were subsequently served on the various third parties on March 18 and 19, 2010. Kelly Decl. ¶ 4.

On March 18 and 19, 2010, the Yavapai County Medical Examiner's Office and Coconino County Medical Examiner's Office apparently "***notified***" the State they had been served with subpoenas *duces tecum* and faxed copies to the State. State's Motion to Quash at

2:21-3:8 (emphasis added) (hereinafter "State's Motion"). Neither coroner contacted defense counsel with objections to the subpoenas, nor has the State alleged the coroners did anything more than "notify" it of the subpoenas. Do Decl. ¶ 5; Kelly Decl. ¶¶ 5-7. Yet, by letter on March 19, 2010, the State accused defense counsel of "illegally prepar[ing]" the subpoenas and demanded their withdrawal and, despite having copies of the subpoenas issued by the Court Clerk, the State further accused defense counsel of committing the misdemeanor crime of knowingly sending or delivering a "document falsely purporting to be an order or other document that simulates civil or criminal process," in violation of Arizona Revised Statutes § 13-2814. Do Decl. ¶ 6 and Exh. B.

On March 22, 2010, setting aside the legal merits (or lack thereof) of the State's demand, defense counsel invited the State to obtain and disclose the information and materials sought in the subpoenas *duces tecum* to obviate any further dispute. Do Decl. ¶ 7 and Exh. C. The State not only ignored the invitation, it inexplicably failed to tell defense counsel it had in fact already provided much of the information and material sought, in a Second Supplemental Disclosure which the defense did not receive until March 22[1] and review until March 26, 2010. Do Decl. ¶ 9; Kelly Decl. ¶ 8. Instead, the State simply filed the instant motion to quash the subpoenas on March 25, 2010.

After completing review of the Second Supplemental Disclosure (which contained 835 pages), the defense believed the State's disclosure was co-extensive with the information sought in the subpoenas *duces tecum*. On March 30, 2010, the defense emailed Deputy County Attorney Bill Hughes notifying the State that it believed the issue was moot and the parties should resolve the matter without taking up the Court's time. Do Decl. ¶¶ 9-10 and Exh. D. On March 31, 2010, the State responded by offering to withdraw the motion to quash on two conditions: (1) the defense agrees to take reasonable steps to withdraw any subpoena *duces tecum* issued; and (2) the defense "agree not to utilize subpoenas *duces tecum* in the future

[1] The State sent the Second Supplemental Disclosure to the Law Offices of Thomas K. Kelly, local defense counsel in Prescott, on March 15, 2010. Mr. Kelley did not review the disclosure and forwarded the disclosure to the Law Offices of Munger, Tolles & Olson in Los Angeles, where it was received on March 22, 2010. Kelly Decl. ¶ 7.

without a court order authorizing the issuance of the subpoenas." Do Decl. ¶ 10 and Exh. D. Mr. Ray agreed to the first and not the second condition. *Id.* and Exh. D. On April 1, 2010, the State notified the defense that it would not withdraw the motion to quash without Mr. Ray's agreement to all of its conditions. *Id.* and Exh. D.

The State filed this motion to quash where none of the subpoenaed parties have challenged the subpoenas or requested the State's intervention. Rather, many have already complied and others were in the process of producing responsive documents when the State interfered. Kelly Decl. ¶¶ 5-7. Other than the coroners who merely "notified" the State of the subpoenas, the remaining parties have not had any contact with the State before the motion to quash was filed. *See* State's Motion at 3:13-16.

III. ARGUMENT AND AUTHORITIES

A. The State has no standing to challenge subpoenas *duces tecum* directed at third parties.

The subpoenas *duces tecum* are directed at third parties, and seek information in which the State has no legitimate interest to prevent disclosure — the State has already disclosed many documents that are identical to those sought by the subpoenas. It is well-settled in Arizona that a *subpoena duces tecum* may only be challenged by the person to whom it is directed or by a person whose personal rights or privileges may be violated. *See, e.g*, *Lipschultz v. Maricopa County*, 128 Ariz. 16, 19-20 (1981) (holding a party has no right to contest a subpoena *duces tecum* directed at a non-party witness unless it has a personal right or privilege to the subject matter of the subpoena); *Humana v. Hospital Desert Valley v. Maricopa County*, 154 Ariz. 396, 403 (App. 1987) (holding a party has no right to contest a subpoena *duces tecum* directed at a non-party witness unless it has a personal right or privilege to the subject matter of the subpoena); and *MacDonald v. Hyder*, 12 Ariz.App.411, 417 (App. 1970) (holding "the right to object is in the witness to whom the subpoena is addressed," and "[u]nless a party to an action can make a claim to some personal right or privilege in respect to the subject matter of a subpoena *duces tecum* directed to a non-party witness, the party ... has no right to relief under Rule 45(b) or 30(b)" of the Arizona Rules of Civil Procedure). *See also*, *In re Grand Jury*

Subpoenas v. United States, 926 F.2d 847, 852 (9th Cir. 1991) (holding a person lacks standing to challenge subpoenas *duces tecum* which are neither directed at him nor seek documents pertaining to him). The State therefore lacks standing to bring this motion to quash and the motion should be denied for this reason alone.

Courts routinely deny government motions to quash subpoenas *duces tecum* issued on behalf of criminal defendants to third parties for lack of standing. *See, e.g.*, *United States v. Williams*, 2007 WL 22878919 *2-3 (E.D. La. 2007) (rejecting government's claim that "law enforcement privilege" conferred standing to quash third-party subpoena *duces tecum*); *United States v. Nachamie*, 91 F.Supp.2d 552, 558-61 (S.D.N.Y. 2000) (holding government lacked standing to move to quash defendant's subpoenas *duces tecum* directed at third parties); *United States v. Daniels*, 95 F.Supp.2d 1160, 1164 (D. Kansas 2000) (holding "the government will often lack standing to challenge a subpoena to a third party absent a claim of privilege, proprietary interest in the subpoenaed material, or some other interest in the subpoenaed material"); and *United States v. Tomison*, 969 F.Supp. 587, 595-96 (E.D. Cal. 1997) (holding government does not have standing to move to quash subpoenas *duces tecum* directed to various third parties). The State counters, contrary to the case law, by insisting that it has standing because: (1) As the prosecutor, it is entitled to police "misuse of the rules and statutes;" and (2) the subpoenaed parties — paramedics, hospitals, fire departments, ambulance companies, and coroners — are "state agencies ... which are under the control of the State within the meaning of" Rule 15." State's Motion at 3:19-23. In essence, the State argues it has standing simply because it is the Government. Not so.

The dubious "right" to "police" compliance with rules and statutes is not a legal interest that establishes standing. The State cites no case for this proposition — there is none. Indeed, the case law illustrates the opposite and does not permit governmental agencies to intrude on the province of the Courts to control the conduct of litigation. In *United States v Tomison*, the government moved to quash subpoenas *duces tecum* sought by the defendants to various third parties requiring pretrial production of documents pertaining to their defense. The Government moved to quash the subpoenas, claiming "it has standing because it is in the best

position to assist the court in ensuring that Rule 17(c) [a federal rule which allows subpoenas *duces tecum* for the production of evidence before trial] is not being improperly used as a discovery device." *Tomison*, 969 F.Supp. at 595-96. The court flatly rejected the government's assertion of standing on this basis. *Id.*

The State's second argument also fails. Whether the subpoenaed parties are "state agencies" under the direction or control of the State is irrelevant to the whether the State has standing. "Courts have routinely found that the government does not have the ability to stand in another's shoes and move to quash a subpoena." *Williams*, 2007 WL 22878919 at *3 (denying government's motion to quash subpoenas directed at ***police officers*** who were named as government witnesses); *see also Nachamie*, 91 F.Supp.2d at 560-61. In *Nachamie*, the court rejected the government's argument it had standing as a "representative" of the subpoenaed parties, even where the subpoenaed parties asked the government to act on their behalf. *Nachamie*, 91 F.Supp.2d at 560-61. Obviously, "the Government cannot undertake to act as counsel to its witnesses." *Id* Here, none of the subpoenaed parties have even requested the State to intervene. If the subpoenas infringe upon some right or privilege of the subpoenaed parties, they have standing to object; but none have.

Nor does the State's bald assertion that paramedics, fire departments, ambulance services, and hospitals are "state agencies" under the direction or control of the State aid its argument — for the simple reason that it is false. Not surprisingly, the State cites no authority for its position. Contrary to the State's contention, coroners are also not an arm of the prosecution. The State argues the coroners operate under its direction and control because Arizona Revised Statutes § 11-597(C) mandates the county medical examiner to perform autopsies if the county attorney or court requests an autopsy. State's Motion at 5:10-19. However, section 11-597(C) also authorizes the county medical examiner to conduct autopsies when requested "by private persons," Ariz. Rev. Stat. § 11-597(C), and thus, according to the State's reasoning, the county medical examiner is also under the direction and control of private persons. This cannot be.

Arizona medical examiners, like all others in jurisdictions throughout the United

States, are "agencies separate from law enforcement and the criminal justice system to preserve their objectivity." *See* http://www.maricopa.gov/MedEx/faq.aspx (defining the duties of Maricopa County Medical Examiner's Office). Arizona medical examiners are appointed by and are responsible only to the Board of Supervisors, not to the county attorneys. Ariz. Rev. Stat. § 11-592. Although the defense is unaware of any published case in Arizona that discusses the status of the medical examiner's office, other jurisdictions uniformly recognize medical examiners are not an "arm of the prosecution" and do not serve under the direction or control of the prosecution. *See e.g.*, *Rollins v. State of Maryland*, 392 Md. 455, (2006) (an "autopsy report [is] not manufactured for the benefit of the prosecution" and "[t]hat it may be presented as evidence in a homicide trial does not mean that it was composed for that accusatory purpose"); *People v. Washington*, 86 N.Y.2d 189, 191-94 (1995) (New York medical examiners "are, by law, independent of and not subject to the control of the prosecutor"); *Carrick v. Locke*, 125 Wash.2d 129, 144 (1994) (Washington Supreme Court recognizing that "[r]ather than simply being an arm of the prosecutor, a coroner's inquest, much like the medical examiner's office itself, must operate as a separate entity which renders an independent, objective opinion."); *Robinson v. State of Texas*, 1998 WL 47821 *5 (Tex.App.-Hous. (1 Dist.) 1998) (not designated for publication) and *Johnston v. State of Texas*, 959 S.W.2d 230, 240-41 (1997) (both holding Texas medical examiners are not considered "law enforcement personnel" in the preparation of autopsy reports for purposes of business records exception); and *Noguchi v Civil Service Comm'n of Los Angeles County*, 187 Cal.App.3d 1521, (1987) (recognizing the Los Angeles Chief Medical Examiner is a separate entity and responsible only to the County's Board of Supervisors in a civil service disciplinary action).

The State simply has no standing to move to quash the subpoenas *duces tecum*. Since standing goes to the jurisdiction of the Court to decide a dispute, and the State has none, the Court should deny this motion without further inquiry. *See e.g.*, *Tomison*, 969 F.Supp. at 595-96.

B. Because the subpoenaed third parties are neither State agencies nor persons under the prosecution's direction and control, Rule 15.1 does not require the defense to first seek the requested information from the State.

The State's argument that Rule 15.1 requires the defense to first seek the information from the State is also without merit. Rule 15.1 governs disclosure only of material and information that are in the possession or control of the prosecutor and its staff, any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or "any other person who has participated in the investigation or evaluation of the case ***and*** who is under the prosecution's direction or control." Ariz. Rules of Crim. Proc. 15.1(f) (emphasis added). As established above, paramedics, fire departments, ambulance services, hospitals, and coroners are not "under the prosecution's direction or control." *See* Opposition to Motion to Quash Subpoenas *Duces Tecum* at 6:17-7:22 *supra*. By its plain language, Rule 15.1 does not require the defense to first seek the requested material and information from the State. Nor does *Carpenter v. Maricopa County*, 176 Ariz. 486 (1993).

The State has misread *Carpenter*. In *Carpenter*, the Maricopa County Public Defender's Office issued subpoena *duces tecum* directed to the Phoenix Police Department, the investigating law enforcement agency of the case without notice to the State. *Carpenter*, 176 Ariz. at 487. As the party with standing, the Phoenix Police Department (not the Maricopa County Attorney's Office) moved to quash the subpoenas *duces tecum,* which the trial court granted. *Id.* at 488. The court of appeals in *Carpenter* unambiguously stated that:

> "The issue presented is whether Arizona Rule of Criminal Procedure 15.1 governs formal discovery requests made on behalf of a defendant in a criminal action ***and directed to the law enforcement agency involved in investigating the action***. If Rule 15 applies, a defendant must either direct his request to the prosecutor, see Rule 15.1.c, or file a motion with the trial court seeking additional material or information. See Rule 15.1.e."[2]

[2] Rule 15.1.c. is now Rule 15.1(f) and Rule 15.1.e. is now Rule 15.1(g).

Id. at 487 (emphasis added). Because the court of appeals concluded that "a law enforcement agency investigating a criminal action operates as an arm of the prosecutor for purposes of obtaining information that falls within the required disclosure provisions of Rule 15.1," *id.* at 490, it held that "[if] a defendant has reason to believe that the prosecutor has not disclosed information within the possession or control of ***such an agency***, his proper recourse is to seek relief pursuant to Rule 15.7 rather than to circumvent the Rules of Criminal Procedure." *Id.* (emphasis added). It is in this context that the court of appeals agreed with the trial court's conclusion "that a criminal defendant cannot use the subpoena power of the court to circumvent the rules of criminal procedure and thereby obtain discovery without knowledge of the state or consent of the trial court." *Id.* at 489.

The defense in this case did not cause the issuance of any subpoenas *duces tecum* to be directed at "an arm of the prosecution" and, thus, neither Rule 15.1 nor *Carpenter* require the defense to first ask the State for the information sought.[3]

C. Rule 15.1(g) does not preclude a defendant in a criminal case from issuing a subpoena *duces tecum* without noticed motion practice.

Although the State has never before objected or commented on defense counsel's issuance of subpoenas *duces tecum* without noticed motion in prior cases, Kelly Decl. ¶¶ 2-3, it now argues different rules apply to Mr. Ray. The State's argument that Rule 15.1(g) precludes a criminal defendant from issuing a subpoena *duces tecum* without noticed motion and order of the Court not only departs from its own practice, it is meritless. A subpoena *duces tecum* is by definition "issued upon request of a party ***without*** a court order." *State Farm Insur. Co v Roberts*, 97 Ariz. 169, 178 (1965) (emphasis added).

[3] The State should consider the consequences of its argument. If the paramedics, doctors, and firemen who treated the participants and the coroners who determined cause of death are "state agents" operating under the direction and control of the State for the purpose of this criminal investigation, the State concedes their lack of independence and objectivity as witnesses at trial. Moreover, the State will assume *Brady* obligations as to each of these agencies. When an agency that "operates as an arm of the prosecutor in matters of discovery ... is recalcitrant, withholds discovery, and misrepresents the existence and availability of information subject to discovery, its conduct, ... is the State's conduct." *State of Arizona v. Meza*, 203 Ariz. 50, 416 (App. 2002). The prosecution's *Brady* obligations include "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case," even absent a request from the defendant to search. *Kyle v. Whitley*, 514 U.S. 419, 437 (1995).

The State's reliance on *Carpenter* is misplaced. *Carpenter* does not preclude a criminal defendant from issuing a subpoena *duces tecum* to a third party without noticed motion and court order. Indeed, the Court of Appeals in *Carpenter* vacated the trial court's order "precluding the Maricopa County Public Defender's Office from directing a discovery subpoena to any third party unless it complied with Rule 15, obtained a written stipulation from all parties and an order from the court or filed an ex parte and motion for good cause shown" as overbroad. *Carpenter*, 176 Ariz. at 488. Not surprisingly, the State completely ignores this ruling in its discussion of *Carpenter*.

Rule 15.1(g) provides for disclosure of material or information within the possession of a "private party or governmental agency not subject to the prosecutor's control" only where the defendant "is unable without undue hardship to obtain the substantial equivalent by other means." Rule 15.1(g); *see Carpenter*, 176 Ariz. at 491. Thus, Rule 15.1(g) contemplates the defendant exhausting his means before noticed motion and court order for disclosure. This Mr. Ray has not done and therefore a noticed motion for court-ordered disclosure under Rule 15.1(g) is premature.

Moreover, the State's argument that Arizona Revised Statutes § 13-4071 exclusively governs the issuance of all subpoenas in a criminal case is misguided. State's Motion at 6:18-24. Section 13-4071 governs the issuance of subpoenas *ad testificandum* to procure "the attendance of a witness before a court or magistrate," Ariz. Rev. Stat. § 13-4071(A), and thus it provides that such "[b]lank subpoenas shall not be used to procure discovery in a criminal case." *Id.* § 13-4071(D). Section 13-4071 does not eliminate subpoenas *duces tecum* in criminal matters.

To the contrary, the Arizona Supreme Court has recognized the "long-standing history of issuing subpoenas seeking documentary evidence ***in criminal matters"*** and has expressly refused to interpret Arizona law governing subpoenas in grand jury proceedings in such a manner as to "also preclude any defendant in a criminal matter from issuing a subpoena *duces tecum*." *Marston's Inc. v. Strand*, 114 Ariz. 260, 263 (1977) (emphasis added).

IV. CONCLUSION

The State's motion to quash subpoenas *duces tecum* issued on behalf of Mr. Ray for independent third parties, which motion was brought unilaterally and without any legal standing, is so frivolous and lacking in merit that it can only be viewed as yet more gamesmanship by the State to thwart Mr. Ray's efforts to defend against this unprecedented prosecution. Mr. Ray respectfully requests that this Court deny the State's motion to quash.

DATED: April 8, 2010

MUNGER, TOLLES & OLSON LLP
BRAD D. BRIAN
LUIS LI
TRUC T. DO

THOMAS K. KELLY

By: _____

Attorneys for Defendant James Arthur Ray

Copy of the forgoing mailed/faxed/
delivered this 8th day of April, 2010, to:

~~Steve Young~~
~~Deputy County Attorney~~
~~3505 W. Hwy 260 East~~
~~Camp Verde, Arizona 86322~~

Bill Hughes
255 E. Gurley
Prescott, AZ 86301

By _____